

10545 Mitigation

10545.1 Overview: A discriminatee must make reasonable efforts during the backpay period to seek and to hold interim employment. This is known as the discriminatee's obligation to mitigate. A discriminatee is not due backpay for any period within the backpay period during which it is determined that he or she failed to make a reasonable effort to mitigate.⁷²

Respondents often question a discriminatee's efforts to seek employment, particularly when the discriminatee has been unemployed for a substantial period. In the face of such questions, the compliance officer should investigate the discriminatee's search for work, keeping in mind that the Board and courts have found that the discriminatee's obligation is to make a reasonable effort to find work under existing circumstances.⁷³ The focus of the investigation is on the search for work; the discriminatee's success or failure in finding work is not determinative.⁷⁴ The Board has found a wide range of efforts to meet the reasonable standard, and has resolved doubt in favor of the discriminatee as the wronged party.⁷⁵

If, following the investigation, the Region concludes that the discriminatee has met his or her obligation to mitigate, it is the respondent's burden to establish that the discriminatee failed to make a reasonable effort to seek interim employment.

See Compliance Manual section 10564.6 regarding treatment of disputed mitigation in settlement discussions.

See Compliance Manual sections 10621.4 and 10621.6 regarding treatment of mitigation in a compliance proceeding.

10545.2 Investigating Mitigation: The compliance officer is responsible for investigating mitigation issues. The discriminatee's account of his or her efforts to obtain employment and of any loss of interim employment, will be the primary source of information upon which a determination will be based. Whenever there is a mitigation issue, the discriminatee should give a complete account of his or her efforts to seek

⁷² E.g., *Painters Local 419 (Spoon Tile Co.)*, 117 NLRB 1596, 1598 fn. 7 (1957).

⁷³ See, for example, *NLRB v. Arduini Mfg. Co.*, 384 F.2d 420, 422-423 (1st Cir. 1968); and *Aircraft & Helicopter Leasing*, 227 NLRB 644, 646 (1976).

⁷⁴ See, for example, *Midwest Motel Management Corp.*, 278 NLRB 421 (1986).

⁷⁵ See, for example, *United Aircraft Corp.*, 204 NLRB 1068 (1973); and *Lundy Packing Co.*, 286 NLRB 141 (1987).

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employment. Particular attention is appropriate for prolonged periods of unemployment.

Note that the Region should not allow respondent counsel to interview discriminatees concerning mitigation issues without clearance from the Division of Operations Management. See Compliance Manual section 10564.7.

As set forth in Compliance Manual section 10540.2, the compliance officer is responsible for communicating with discriminatees as soon as the Region has determined that a violation has occurred that may result in a backpay remedy. Disputes concerning mitigation may be avoided if the discriminatee is clearly advised at that time of his or her obligation to mitigate, and further advised to keep notes or records of efforts to seek interim employment. Form NLRB-4288 contains such advice.

10545.3 Evaluating Mitigation Efforts: The efforts a discriminatee is expected to make to get interim employment are those expected of reasonable persons in like circumstances. A variety of actions may demonstrate an effort to seek employment, including registering with state or private employment services, checking newspaper ads, visiting employers, and asking friends and relatives. Specific actions to seek employment may be influenced by age, health, education, employment history, and station in life, as well as by employment and unemployment trends in the area. The presence or absence of any particular search activity does not determine mitigation.

Failure to obtain interim employment, even for a prolonged period, does not establish a failure to mitigate.

The evaluation of mitigation must take into account circumstances that limit opportunities and discourage efforts, e.g., unemployment may be high; a discriminatee may have limited skills. In such circumstances, the number of employment applications filed or even the amount of time devoted to searching for employment is not dispositive of mitigation.

Discriminatees who have been terminated from skilled or high wage employment may reasonably limit their job search to equivalent employment.⁷⁶

⁷⁶Discriminatees with “extensive experience in a specialized field” may be required to seek interim employment within their area of specialization avoid a finding of willful loss. *Associated Grocers*, 295 NLRB 806, 811 (1989); *NHE/Freeway, Inc.*, 218 NLRB 259 (1975); *Knickerbocker Plastic Co.*, 132 NLRB 1209 (1961).

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Discriminatees are not normally required to accept lower-paying employment nor to move in order to accept employment.⁷⁷

In the context of an overall search effort, the Board has found that a brief period during which a discriminatee undertook no activities to seek employment did not constitute a failure to mitigate.⁷⁸

In the end, a determination of mitigation will depend on applying the standard of reasonable efforts to the unique circumstances of the case.

10545.4 Loss of Interim Employment: An unreasonable discriminatee action that results in a loss of interim employment may constitute a failure to mitigate. Should a discriminatee reject an offer of interim employment, quit interim employment, or be terminated from interim employment, the circumstances should be fully investigated. The discriminatee should be interviewed, and corroboration sought from the interim employer if appropriate.

When a discriminatee voluntarily quits interim employment, the burden shifts from the respondent to the Region to show that the decision was reasonable.⁷⁹

When a discriminatee has been involuntarily terminated from interim employment, however, a higher standard may apply, namely that the discriminatee must have engaged in gross misconduct, before the termination constitutes a failure to mitigate.⁸⁰

When it is determined that a loss of interim employment was a failure to mitigate, the amount of lost interim earnings should be calculated and offset against gross backpay as though actually earned by the discriminatee.⁸¹

⁷⁷ See, for example, *Hacienda Hotel & Casino*, 279 NLRB 601, 605–606 (1986); and *Iron Workers Local 15*, 298 NLRB 445, 469 (1990).

⁷⁸ See, for example, *Saginaw Aggregates*, 198 NLRB 598 (1972); and *Retail Delivery Systems*, 292 NLRB 121, 125 (1988).

⁷⁹ See, for example, *Big Three Industrial Gas Co.*, 263 NLRB 1189, 1199 (1982); and *Alamo Cement Co.*, 298 NLRB 638 (1990).

⁸⁰ See *Ryder Systems*, 302 NLRB 608, 610 (1991).

⁸¹ See *Knickerbocker Plastic Co.*, 132 NLRB 1209, 1212–1216 (1961).

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10546 Unavailability for Employment or Withdrawal from Labor Market

10546.1 Overview: When a discriminatee becomes unavailable for employment or withdraws from the labor market, gross backpay is generally tolled for the period of unavailability. Investigation of this issue will again depend largely on the discriminatee interview. Sources of documentation could include medical records, school records, or institutional records, depending on the case. Common situations of unavailability for employment are discussed in the following sections.

10546.2 Illness or Injury: In general, backpay is tolled for a discriminatee who has been unable to work due to illness or injury for a period of 3 days or more. Note that if the gross employer had sick leave or similar benefits, compensation due under such benefits should be considered as a component of gross backpay. See Compliance Manual section 10535.4.

10546.3 Pregnancy: When a discriminatee is unavailable for employment as a result of pregnancy, backpay is tolled. The period of unavailability is not determined by any formula, but must be established in each case. The appropriate tolling period is the period the discriminatee would have taken off from work in the absence of any unlawful action. This period may be established by any relevant evidence, including the statement of the discriminatee, medical records, the amount of pregnancy leave taken for past pregnancies, and the gross employer's medical leave policies, unless those policies violate relevant equal opportunity laws, including the Family and Medical Leave Act of 1993. Questions concerning the applicability of that Act should be directed to the Division of Operations Management.

10546.4 Exceptions: Unavailability Due to Injury or Illness Attributable to Interim Employment or Unfair Labor Practices: Exceptions to the general policy are when periods of unavailability for employment result from an injury suffered during interim employment,⁸² or from an unfair labor practice.⁸³

10546.5 Attendance at an Educational Institution: Backpay should normally be tolled during any period in which the discriminatee is a full-time student. This normal policy may be rebutted if the

⁸² See, for example, *American Mfg. Co.*, 167 NLRB 520, 522–523 (1967).

⁸³ See, for example, *Greyhound Taxi Co.*, 274 NLRB 459 (1985), and *Moss Planing Mill Co.*, 103 NLRB 414, 419 (1953).

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discriminatee was a full-time student prior to the unlawful action, or can demonstrate an availability for employment through such actions as continued efforts to seek employment or an established willingness to leave school at any time for employment or reinstatement.⁸⁴

10546.6 Military Service: Service in the Armed Forces constitutes unavailability for employment.⁸⁵

10546.7 Undocumented Aliens: As a result of the Supreme Court's decision in *Sure Tan, Inc. v. NLRB*, 467 U.S. 883, 902–903 (1984), the Board has conditioned the reinstatement and backpay remedies of discriminatees on their being lawfully entitled to be present and employed in the United States.

Effective November 6, 1986, the Immigration Reform and Control Act of 1986 (IRCA) established, among other provisions, requirements that employers verify the legal residence status of employees. General Counsel Memorandum 88-9 (see Appendix 3 for a copy) sets forth current policy regarding reinstatement and backpay where a discriminatee's legal status is in dispute.

Discriminatees first hired before November 6, 1986: The respondent is responsible for establishing that a discriminatee hired before the IRCA effective date is not lawfully entitled to be present and employed in the United States. This burden is met only by proffering a final Immigration and Naturalization Service (INS) determination that a discriminatee is not lawfully entitled to be present and employed. Because of this, it is not necessary or proper to address a discriminatee's immigration status before the Board, as the determination of this status must be made by the INS.

Regions should submit to Advice any cases which present the question of whether a respondent could rely on an INS determination that has been appealed.

Compliance action should not be held in abeyance pending the outcome of any INS proceeding. A discriminatee hired on or before November 6, 1986, is presumed to have entitlement to backpay and reinstatement unless and until INS determines that he or she is not entitled to be present and employed in the United States.

⁸⁴ See, for example, *J. L. Holtezenorff Detective Agency*, 206 NLRB 483, 484–485 (1973).

⁸⁵ *United States Steel Corp.*, 293 NLRB 640 fn. 2 (1989).

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A final INS determination that a discriminatee is not entitled to be lawfully present and employed in the United States forecloses a reinstatement remedy and tolls backpay. Backpay should, however, be sought for the period prior to the final INS determination.

Discriminatees first hired after November 6, 1986: Under provisions of IRCA, an employer who knowingly hires an “unauthorized alien” after November 6, 1986, is subject to criminal sanctions. Employers must also obtain verification from employees hired after November 6, 1986, that they are lawfully present and available for employment in the United States.

A respondent who reinstates an employee who was first hired before November 6, 1986, is not subject to these IRCA provisions, as an unlawful termination is not considered an interruption in employment.

Respondents must comply with IRCA provisions for all employees hired after November 6, 1986, and thus may require that discriminatees complete the appropriate portion of the I-9 form and submit appropriate documentation as a condition of reinstatement. Reinstatement is foreclosed for discriminatees who will not complete the I-9 form and present appropriate documentation, and backpay is tolled at that time.

If the respondent contends that a discriminatee has submitted fraudulent documentation of immigration status, the issue should be submitted to Advice.

Regions should also submit to Advice any issue concerning a discriminatee’s failure to seek or obtain interim employment because of an inability to provide required documentation of immigration status.

10546.8 Other Forms of Unavailability for Employment or Withdrawal from the Labor Market: Unavailability for employment may result from any number of situations. Incarceration or institutionalization should normally render a discriminatee unavailable for employment. When discriminatees take vacations, travel, attend to personal concerns, or otherwise appear to be unavailable for employment, the circumstances of the case must be evaluated.⁸⁶

A withdrawal from the labor market is characterized by a cessation of efforts to seek employment. Thus, a withdrawal from the labor market

⁸⁶ See, for example, *L’Ermitage Hotel*, 293 NLRB 924 (1989).

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should constitute a failure to mitigate as well, and should be determined in the same manner. See Compliance Manual section 10545.

10546.9 Retirement: If a discriminatee has retired and has withdrawn from the labor market by ceasing further efforts to seek employment, backpay should be tolled. An individual may, however, apply for social security or other retirement benefits as a source of income while still seeking employment; retirement does not necessarily establish a withdrawal from the labor market.⁸⁷

10548 Investigation of Backpay When Discriminatees Are Missing

10548.1 Overview: Even when discriminatees are missing or unavailable, backpay should be determined at appropriate times during the course of unfair labor practice proceedings. It is very important that the compliance officer maintain contact with discriminatees from the earliest phases of unfair labor practice proceedings, as the absence of a discriminatee will complicate determination of backpay issues and may delay full resolution of a case. See Compliance Manual section 10540.2 for procedures to follow to establish and maintain contact with discriminatees at the time a complaint issues.

Where contact has been lost, or where discriminatees are only identified later in the course of proceedings, strenuous efforts should be made to locate them. Compliance Manual section 10548.2, immediately following, discusses methods and resources that may be used in locating missing discriminatees.

Subsequent sections discuss procedures to use in resolving unfair labor practice cases when discriminatees cannot be found or are unavailable.

10548.2 Resources Available for Locating Missing Discriminatees. There are many methods for finding discriminatees. The most promising methods in a case will depend on the circumstances of the case. The following are among methods and resources available for finding missing discriminatees:

Employer records. Employer personnel and payroll records should include a last known address. Employment applications and other personnel records may include references or names of other individuals who could help locate

⁸⁷ See, for example, *Roman Iron Works*, 292 NLRB 1292 fn. 3 (1989).

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a person. Employer records should also include a social security number, which is needed to pursue other search methods, as discussed below.

Form NLRB-916. The NLRB claimant identification form should be mailed to all discriminatees at the time complaint issues. See Compliance Manual section 10540.2. It asks discriminatees for names of individuals who will be able to help locate them in the future.

Coworkers, witnesses. Contacts made during the unfair labor practice investigation are sources of information in locating missing discriminatees.

Unions, other associations, licensing boards. If the discriminatee was a member of a union or other association, or worked in an occupation that required some form of licensing, these are sources of information.

State employment departments. Most States have such a department that is responsible for assessing unemployment taxes and for administering payment of unemployment benefits. They can often provide address information on an individual based on recent employment or receipt of unemployment benefits. The information required by these department to search their own records, such as discriminatee name and social security number, as well as procedures for submitting a request for information, varies, and compliance officers should inquire with the appropriate state employment department.

State motor vehicle departments. Most state motor vehicle departments maintain address information based on vehicle registration or driver's licenses. Again, policies regarding information requests, and identifying information needed to respond to a request, vary, and compliance officers should inquire with the appropriate state office.

Private tracing services. The NLRB has maintained contracts with private data services to provide address information for individuals. These services collect information on individuals from credit applications and reports, and have proven useful in providing address information quickly at a low cost. The Division of Operations Management issues periodic memoranda regarding the current provider of this service and procedures for using it. Because this service involves cost, Regions should exhaust other cost-free methods of finding discriminatees before requesting authorization from the Division of Operations Management to use it.

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Armed services. The addresses of discriminatees presently on duty with the Armed Forces or the last known address of discriminatees with past service in the Armed Forces may be obtained through the National Personnel Records Center, 9700 Page Street, St. Louis, MO 63132, using the following telephone numbers:

Officers—all services: 314-263-1000

Enlisted personnel

Army: 314-263-7261

Air Force: 314-263-7243

Navy, Marine Corps, and Coast Guard: 314-263-7171

Merchant Marine: The address of discriminatees who are in the Merchant Marine may be requested through the Commandant, United States Coast Guard, Attn: Merchant Vessel Personnel, Locator Service G-PIM-2, 2100 Second Street, S.W., Washington, D.C. 20593-0001, Telephone 202-267-1340

The Social Security Administration. The Social Security Administration (SSA) maintains records of payroll taxes paid by employers on behalf of individuals. Thus, SSA may have information concerning current employers of individuals. SSA also has current address information of individuals receiving some form of benefit. SSA will forward letters by the NLRB to individuals in the care of current employers or to individuals for whom it maintains a current address.

To use this method to attempt to reach a missing person, an appropriate letter to the individual should be prepared. Such a letter may include information about the case, urge that the individual communicate with the compliance officer, note the importance of cooperation, and include an Form NLRB-916 as well as a return envelope.

The letter should be enclosed in a blank envelope. Only the individual's name and social security number should be on the envelope.

Regions should submit the letter to be forwarded to SSA to the Division of Operations Management, which will in turn make a periodic submission to SSA, and will be responsible for any fee charged by SSA.

The Internal Revenue Service. The Internal Revenue Service (IRS) will also forward letters to discriminatees if it has an address on its records for that individual. Under its confidentiality policy, IRS will not provide

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the NLRB with an individual's address, nor even advise the NLRB whether it had an address or whether any letter it forwarded was returned.

To attempt to reach a missing individual by requesting that IRS forward a letter, an appropriate letter should be prepared addressed to the individual. That letter should contain, in addition to information concerning the case and the importance of communicating with the Region, the following paragraph:

In accordance with current policy, the Internal Revenue Service (IRS) has agreed to forward this letter because the National Labor Relations Board does not have your current address. The IRS has not disclosed your address or any other tax information and has no involvement in the matter aside from forwarding this letter.

The letter should be placed in a blank envelope, with only the name and social security number of the individual on it. The letter should be accompanied by a cover letter to the IRS requesting that the enclosed letter be forwarded based on its address records. When the request is to forward letters to more than one individual, the cover letter should list all individuals to whom letters are to be forwarded, with the list in sequential order by social security number, not alphabetically by name.

If a Region is requesting that IRS forward letters to fewer than 50 individuals, the request should be submitted to the district director of the Internal Revenue Service, to the attention of the disclosure officer, for the IRS district in which the Region is located.

If a Region is requesting that IRS forward letters to 50 or more individuals, the request should be submitted to Director, Disclosure and Security Division, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, D.C. 20224. Regions should also obtain clearance from the Division of Operations-Management before submitting such requests.

IRS, although willing to forward letters to individuals for whom it has address information, asks that its service be considered only as a last resort. In addition, current IRS policy is to charge a fee for requests involving over 50 letters. For these reasons, the IRS service should be used only after other means of locating individuals have been exhausted. Further, prior to submitting a request involving 50 or more individuals, Regions should consider communicating with the IRS Disclosure and Secu-

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rity Division to ascertain current fees, time required to process a request, and other considerations that might affect a decision to submit the request.

Newspaper advertisements. On rare occasions, newspaper advertisements may offer a useful means of locating missing discriminatees. Division of Operations Management authorization must be requested for any advertising.

10548.3 Tolling Backpay When Discriminatees Are Missing:

The backpay period may be suspended when a respondent establishes that it has made a reasonable effort to locate and offer reinstatement to a discriminatee that it cannot locate.⁸⁸ The backpay period may resume, and standard reinstatement requirements will remain, at such time as the discriminatee is located. See Compliance Manual section 10529.7.

10548.4 Determining Backpay for Missing Discriminatees: Even when discriminatees are missing, backpay should be determined when respondents wish to settle a case or comply with a Board order, when compliance proceedings must go forward, or at any time it is appropriate to determine backpay in order to resolve a case. It is particularly important in cases involving more than one discriminatee that resolution of the case not be impeded for the discriminatees who are present by the fact that other discriminatees cannot be found.

Although the discriminatee should provide information used in determining gross backpay, a reasonable determination of gross backpay may be possible based on gross employer records and other witnesses.

In cases involving a number of discriminatees, it may be established that a missing discriminatee is comparable to other discriminatees for determining gross backpay.

It will be unlikely that interim earnings and related issues can be fully determined without contact with the discriminatee. For purposes of resolving cases, two methods of establishing interim earnings are available. In cases involving a number of comparable employees, an estimate of interim earnings may be based on the average interim earnings of other discriminatees. If comparisons with other discriminatees seem inappropriate, or if a case involves only one discriminatee, interim earnings may be estimated as 75 percent of gross backpay.

⁸⁸ See, for example, *Bodolay Packaging Machinery*, 271 NLRB 10 (1984).

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See Compliance Manual section 10564.9 regarding settlement of backpay in cases involving missing discriminatees.

See Compliance Manual sections 10621.7 and 10629.7 regarding treatment of missing discriminatees in a compliance specification.

See Compliance Manual section 10645.3 regarding escrow of backpay in cases involving missing discriminatees, and section 10646 regarding the eventual extinguishment of a missing discriminatee's backpay entitlement after compliance is otherwise achieved.

10548.5 Procedures for Determining Backpay Due Uncooperative Discriminatees: Should a discriminatee refuse to cooperate, it must be remembered that the remedies afforded by the Act are public, not private, rights. Enforcement of the Act cannot be frustrated by the whim or preference of individual discriminatees. When appropriate, backpay due an uncooperative discriminatee may be determined using the same methods as for missing discriminatees, set forth in section 10548.4 above.

Note also that in some situations, noncooperation may appear to be a concealment of interim earnings. See Compliance Manual section 10540.5.

See Compliance Manual section 10564.10 regarding settlement of cases involving uncooperative discriminatees.

See Compliance Manual sections 10621.7 and 10629.7 regarding treatment of uncooperative discriminatees in compliance proceedings.

10548.6 Procedures for Determining Backpay Due Deceased Discriminatees: Backpay should be determined for a deceased discriminatee. Gross backpay may be determined using the appropriate method and information available from the gross employer or other sources. Even though death tolls the backpay period, any life insurance or death benefit provided by the gross employer will be a component of gross backpay.

A death certificate may generally be obtained from the health department of the county in which the death occurred. Death certificates generally contain information which can be used to communicate with the next of kin. Next of kin may be able to provide all information and documentation required to determine interim earnings, mitigation, and availability for employment issues, as well as information concerning the deceased

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discriminatee's estate which will be needed in order to make payment of net backpay.

Form NLRB-4181, Authorization to Social Security Administration to Furnish Employment and Earnings Information of Decedent, may be used to obtain an earnings report from the Social Security Administration. Form NLRB-4181 must be completed and signed by appropriate next of kin, and should be submitted, with a covering memorandum, to the Director in Charge of Accounting Operations, Social Security Administration, Baltimore, Maryland 21235.

Compliance Manual section 10635.6 sets forth procedures for distributing backpay due a deceased discriminatee.

10550 Net Backpay

10550.1 Overview: Net backpay is the amount of backpay a respondent must pay a discriminatee. The challenge in determining net backpay is in determining all components of gross backpay, in determining all appropriate offsets resulting from interim employment, in determining mitigation and availability for employment issues, and in determining tolling issues.

The final calculation of net backpay is simply all gross backpay minus all offsets from interim employment within the backpay period.

10550.2 Allocation to Calendar Quarters: Net backpay is calculated on the basis of calendar quarters. Thus, to determine net backpay, all gross backpay and interim earnings offsets must be allocated to calendar quarters within the backpay period, and a net backpay amount calculated for each quarter. Total net backpay in a case is the sum of net backpay as calculated for each quarter.

Because backpay is determined on the basis of calendar quarters, earnings that have been documented on an annual basis must be allocated to calendar quarters.

For example, W-2 forms and social security earnings reports provide earnings information on an annual basis. To allocate total annual earnings to calendar quarters, it may be appropriate to attempt to confirm employment dates and quarterly earnings with employers. Where this cannot be done,

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or is impractical, a reasonable allocation may be made on the basis of approximate employment dates provided by the discriminatee.

Note that Form NLRB-4312 provides a useful format for setting out on a quarterly basis gross backpay, appropriate interim earnings, interest, and other elements of the net backpay determination. It is designed to be used as both a worksheet and a final document.

Note also that in recent years Regional Offices have had available spreadsheet programs that are very useful in calculating and summarizing net backpay. Familiarity with and use of spreadsheet formats is encouraged as an efficient means of calculating and presenting backpay determinations.

10550.3 No Carryover of Offsets: No net backpay is due in any quarter in which offsets from interim earnings equal or exceed gross backpay. Offsetting interim earnings that exceed gross backpay in any quarter are *not* applied against gross backpay due in any other quarter.

For example, a discriminatee was unemployed for the remainder of the quarter in which he was unlawfully discharged. The following quarter he obtained interim employment that paid substantially more than he had been earning from the respondent prior to his discharge. A year later, the respondent offered him reinstatement, ending the backpay period. His total earnings from interim employment exceeded total gross backpay accrued throughout the backpay period. Because net backpay is determined on a calendar quarterly basis, and because interim earnings in excess of gross backpay within a quarter are not applied against gross backpay accruing in other quarters, the discriminatee in this case is due backpay for the quarter in which he was discharged.

This policy was established in the Board's Decision and Order in *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

10550.4 Determining Backpay When the Backpay Period Has Not Ended: The backpay period is normally ended when the discriminatee has been offered reinstatement to his or her former position. See Compliance Manual section 10527 for a full discussion of reinstatement and tolling of the backpay period. In many cases, it will be useful to make a current assessment of backpay liabilities even though the backpay period continues. In these situations, the parties should be apprised of current net backpay. In many cases, it will also be useful to advise the parties of the current rate of accrual of additional net backpay.

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When a respondent is acting to comply, and offers reinstatement to a discriminatee, it is generally appropriate to calculate net backpay through the tolling date. The compliance officer must also confirm that reinstatement has in fact been offered, and that the end of the backpay period has been properly reached.

10555 Interest

Interest is charged on net backpay and other monetary liabilities due in an unfair labor practice case. It is the compliance officer's responsibility to determine the interest amount due.

10555.1 Calculation of Interest: The amount of interest charged is based on the amount of backpay due, the length of time for which it has been due, the interest rates in effect during that period of time, and the method of applying those interest rates.

10555.2 Interest on Backpay Is Not Compounded, But Charged as Simple Interest: That is, the total interest rate charged on backpay due is the sum of the rates in effect over the period of time for which interest is charged.

For example, net backpay of \$1000 is due for the fourth quarter of 1970. At the end of 1971, a year has passed since the backpay was due. The interest rate in effect throughout 1971 is 6 percent. The total interest rate as of the end of 1971 is thus 1 year at 6 percent per year, or 6 percent. The interest amount due at that time is thus \$60.

As of the end of 1972, the total interest rate is 2 years at 6 percent per year, or 12 percent. The total interest amount due at that time is \$120.

On June 30, 1973, the end of the second quarter of 1973, the total interest rate is 2-1/2 years at 6 percent per year, or 15 percent. The total interest amount due at that time is \$150.

10555.3 A Different Rate of Interest Is Charged for Each Different Calendar Quarter of the Backpay Period: Net backpay is determined for each calendar quarter of the backpay period. See Compliance Manual section 10550.2. Interest on net backpay is charged commencing with the last day of the calendar quarter in which net backpay is due until backpay has been paid. Thus, a different total interest rate must

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be calculated for every calendar quarter of the backpay period. The total interest amount due on net backpay due for all quarters of the backpay period is the sum of the interest amounts calculated for each calendar quarter.

Extending the above example, net backpay of \$1000 is also due for the first quarter of 1971. The backpay period ended at that time. At the end of the fourth quarter of 1971, the total interest rate charged on backpay due in the first quarter of 1971 is three-fourths of the annual interest rate of 6 percent, or 4.5 percent. The interest amount due at the end of 1971 on backpay due for the first quarter of 1971 is \$45.

The total interest amount due at the end of 1971 on the total backpay of \$2000 is the sum of the interest amounts due on backpay for the fourth quarter of 1970 and the first quarter of 1971, or \$105.

10555.4 The Interest Rate in Unfair Labor Practice Cases Is the Varying Rate Assessed by the Internal Revenue Service on Underpaid Taxes:⁸⁹ The rate has changed greatly over recent years, and the Division of Operations Management issues memoranda providing the most recently established rate. The following are interest rates and periods of time during which they have been in effect through September 30, 1993:

<i>Effective Period</i>	<i>Annual Percentage Rate</i>	<i>Quarterly Percentage Rate</i>
Prior to July 1, 1975	6	61.5
July 1, 1975, to December 31, 1977	7	1.75
January 1, 1978, to December 31, 1979	6	1.5
January 1, 1980, to December 31, 1981	12	3
January 1, 1982, to December 31, 1982	20	5
January 1, 1983, to June 30, 1983	16	4
July 1, 1983, to December 31, 1984	11	2.75
January 1, 1985, to June 30, 1985	13	3.25
July 1, 1985, to December 31, 1985	11	2.75
January 1, 1986, to June 30, 1986	10	2.5
July 1, 1986, to September 30, 1987	9	2.25
October 1, 1987, to December 31, 1987	10	2.5
January 1, 1988, to March 31, 1988	11	2.75
April 1, 1988, to September 30, 1988	10	2.5
October 1, 1988, to March 31, 1989	11	2.75
April 1, 1989, to September 30, 1989	12	3
October 1, 1989, to March 31, 1991	11	2.75
April 1, 1991, to December 31, 1991	10	2.5

⁸⁹ *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

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<i>Effective Period</i>	<i>Annual Percentage Rate</i>	<i>Quarterly Percentage Rate</i>
January 1, 1992, to March 31, 1992	9	2.25
April 1, 1992, to September 30, 1992	8	2
October 1, 1992, to September 30, 1993	7	1.75

10555.5 The Total Interest Rate Is the Sum of the Varying Rates in Effect During the Period for Which Interest Is Charged:
Because a different interest amount is calculated for each calendar quarter, it is generally most convenient to work with quarterly interest rates.

For example, net backpay of \$1000 is due for the fourth quarter of 1987. Interest is charged commencing with the last day of the quarter. Thus, as of December 31, 1989, the last day of the fourth quarter of 1989, applying the rates set forth above in Compliance Manual section 10550.4, total interest of 22 percent is charged:

First quarter of 1988:	2.75 percent
Second quarter of 1988:	2.5 percent
Third quarter of 1988:	2.5 percent
Fourth quarter of 1988:	2.75 percent
First quarter of 1989:	2.75 percent
Second quarter of 1989:	3 percent
Third quarter of 1989:	3 percent
Fourth quarter of 1989:	2.75 percent
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Total Interest Rate:	22.00 percent

The total interest amount due as of December 31, 1989, on backpay due for the fourth quarter of 1987 is \$220.

The total interest rate charged as of December 31, 1989, for net backpay due for the first quarter of 1988 is 19.25 percent, reflecting accrual of interest at the above rates commencing with the last day of the first quarter of 1988.

The total interest rate charged as of December 31, 1989, for net backpay due for the second quarter of 1988 is 16.75 percent, reflecting accrual of interest at the above rates commencing with the last day of the second quarter of 1988.

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10555.6 Total Interest Rates Must Be Periodically Updated:

The total interest rate is always calculated as of a specific date. The total interest rate charged increases as time passes and must be updated to remain current.

Extending the above example, as of March 31, 1990, the total interest rate charged on backpay due for the fourth quarter of 1987 has increased to 24.75 percent, because of the accrual of an additional 2.75-percent interest in the first quarter of 1990. Total interest due on March 31, 1990, for backpay due for the fourth quarter of 1987 is \$247.50.

As of March 31, 1990, the total interest rate charged for backpay due for the first quarter of 1988 is 22 percent, and the total interest rate charged for backpay due for the second quarter of 1988 is 19.5 percent.

As of June 30, 1990, the total interest rate charged for backpay due for the fourth quarter of 1987 has increased to 27.5 percent, with the accrual of an additional 2.75 percent interest for the second quarter of 1990. Total interest due on June 30, 1990, for backpay due for the fourth quarter of 1987 is \$275.

Note that the different total interest rates charged for different calendar quarters of the backpay period all increased by the same amount at the close of each new calendar quarter. Each increased by the quarterly interest rate in effect during the quarter that just closed.

10555.7 Calculating Interest in the Current Calendar Quarter:

When the backpay period has not ended, it is often appropriate to calculate current net backpay and to project the continuing accrual of backpay. See Compliance Manual section 10550.1. It also may be appropriate to calculate interest to a current date within a calendar quarter or to project interest to a date in anticipation of payment of backpay.

Because interest begins to accrue commencing with the last day of the calendar quarter in which backpay is due, interest is not charged on backpay that has accrued or is accruing within the current calendar quarter.

Interest on backpay due for earlier quarters does accrue during the current calendar quarter. Interest due in the current calendar quarter is calculated by the same method set forth in preceding sections, but using a monthly, weekly, or daily interest rate for the current quarter. The monthly interest rate is one-third the quarterly interest rate; the weekly interest rate is

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one-thirteenth the quarterly interest rate; and the daily interest rate is one-nintieth the quarterly interest rate.

In the above example (from Compliance Manual sec. 10555.6), the total interest rate charged on backpay due for the fourth quarter of 1987 was 27.5 percent as of June 30, 1990. The interest rate in effect during the third calendar quarter of 1990, beginning July 1, is 2.75 percent per quarter. At this quarterly rate, the monthly interest is .92 percent, the weekly interest rate is .21 percent, and the daily interest rate is .03 percent.

Thus, as of August 1, 1990, the total interest rate charged on backpay due for the fourth quarter of 1987 is 28.42 percent, reflecting accrual of interest for the month of July at the monthly rate of .92 percent. As of August 7, 1990, the total interest rate charged on backpay due for the fourth quarter of 1987 is 28.63 percent, reflecting accrual of interest for the first week of August at the weekly rate of .21 percent. As of August 8, 1990, the total interest rate charged on backpay due for the fourth quarter of 1987 is 28.66 percent, reflecting accrual of interest on August 7 at the daily rate of .03 percent.

Interest is charged on backpay until the date backpay has been paid. Note, however, that with net backpay of \$1000, and a daily interest rate of .03 percent, the total interest amount increases by only 30 cents per day. When interest is being calculated in anticipation of payment, judgment should be exercised to avoid an excessive expenditure of time to gain a precision that will represent only a small difference in the final amount of interest due.

10555.8 Use of Spreadsheets to Sum and Update Quarterly Interest Rates and to Sum Quarterly Interest Amounts: Spreadsheet programs available in Regional Offices should be used to calculate, present, and update interest rates and amounts. Spreadsheet formats allow for clear presentation of backpay and interest amounts on a calendar quarterly basis, for quick and accurate updating of total interest rates, and for summing total net backpay and interest amounts.

10555.9 Interest on Other Backpay Liabilities: Board orders may provide for reimbursement of medical expenses, refunds of dues, or other forms of monetary liabilities, with interest. When they do, the method of calculating interest is the same as that used for net backpay, set forth in the above sections.

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10555.10 Interest on Liabilities to Benefit Funds: The standard provision in a Board order that requires retroactive payments to benefit funds refers to *Merryweather Optical Co.*, 240 NLRB 1213, 1217 fn. 7 (1979). In addition to basic contributions, that provision requires payments to funds based on provisions of the funds themselves for late contributions or, in the absence of such provisions, to evidence of losses to the funds that are directly attributable to the unlawful withholding of contributions.

To charge interest or other fees on benefit fund contributions due, the compliance officer must establish what provisions have been established by the benefit fund for such charges. These charges may be applied to the contribution liabilities. In the absence of specific provisions, fund practice, or reasonable assessment of interest lost may be a reasonable basis for assessing the loss to the fund.

Note, however, that although benefit funds often have provisions requiring payment of legal expenses incurred as a result of failure to make timely payment of contributions, the Board has rejected payment of legal expenses to benefit funds.⁹⁰

10556 Sample Backpay and Interest Calculation

It is May 1, 1993. A Board order has just issued, finding that John Jones was unlawfully terminated on August 15, 1991, and ordering reinstatement and backpay for him.

Gross Backpay: The compliance investigation establishes that at the time of his termination, Jones was earning \$12.50 per hour, and working a regular schedule of 40 hours per week. The Respondent offers little or no overtime, but has had steady work available from the time of Jones' discharge through the present. It has also had a wage freeze in effect during this entire period.

Based on the above, it is determined that gross backpay due Jones is based on a projection of his hourly wage rate and weekly schedule, or \$500 per week, throughout the backpay period. For the third quarter of 1991, the backpay period is the 6.5-week period August 16–September 30. Gross backpay due for that quarter is thus \$3250. For all subsequent quarters through March 1993, gross backpay is \$6500. For the current quarter, through May 1, 1993, gross backpay is \$2167.

⁹⁰*G. T. Knight Co.*, 268 NLRB 468, 470–471 (1983).

Interim Earnings: Jones has accounted for his interim earnings and availability for employment. He searched for interim employment without success until mid-October 1991. He then obtained employment, and through December 1991 earned \$6000. He continued with that employment through July 1992, earning \$2500 per month, or a total of \$7500 in the first and second quarters of 1992. His earnings in July 1992 were \$3000. On August 1, however, he was injured in an auto accident that was unrelated to his interim employment. He remained disabled until October 1, 1992. He was released for work on that date, but had lost his interim employment as a result of his 2-month absence. On November 1, he began another interim job, one that paid him \$10 per hour. Through December 31, 1992, he earned a total of \$3200. During the first quarter of 1993, he earned a total of \$5200. At present, his work remains steady, with the same wage rate and a 40-hour workweek, so that he has gross wages of \$400.

Gross backpay, interim earnings, net backpay, the total interest rate, and the interest amount through May 1, 1993, are as follows:

<i>Yr./Qtr.</i>	<i>Gross Backpay</i>	<i>Interim Earnings</i>	<i>Net Backpay</i>	<i>Interest Rate</i>	<i>Interest Amount</i>
91/3	\$3,250	\$0	\$3,250	12.83	\$417
91/4	6,500	6,000	500	10.33	52
92/1	6,500	7,500	0	8.08	0
92/2	6,500	7,500	0	6.08	0
92/3	2,167	3,000	0	4.08	0
92/4	6,500	3,200	3,300	2.33	77
93/1	6,500	5,200	1,300	.58	8
Apr. 93	2,167	1,733	434	0	0
Total:			\$8,784		\$554

Note that interim earnings exceed gross backpay for 92/1, 92/2, and 92/3, leaving no net backpay for those quarters, but that interim earnings in excess of gross backpay for those quarters are not offset against gross backpay from any other quarter. See Compliance Manual section 10550.3.

Note that in this example, all calculations have been based on 13-week calendar quarters. Particularly during short backpay periods, it may be appropriate to base calculations on the exact number of weeks or days.

Note that gross backpay for 92/3 is for 1 month, reflecting Jones' unavailability for work for 2 months during that quarter. See Compliance Manual section 10546.2.

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Note that gross backpay is not adjusted during the period of Jones' injury based on sick leave or disability benefits provided by the gross employer. The compliance investigation established that the gross employer provided no such benefit. See Compliance Manual section 10535.4.

Note that Jones lost interim employment as a result of his auto accident. Although gross backpay is tolled for the period of his resulting disability, as noted above, the Region determined that his automobile accident was not the result of gross misconduct on his part that would constitute a willful loss of earnings. See Compliance Manual section 10545.4.

Note that net backpay is currently accruing at the rate of \$100 per week.

Note that total interest rates are based on rates set forth in Compliance Manual section 10555.4. For example, interest on backpay due for the calendar quarter 91/3, 12.83 percent, is the sum of the quarterly rates of 2.5 percent in effect for the fourth quarter of 1991, 2.25 percent in effect for the first quarter of 1992, 2 percent for the second quarter of 1992, 2 percent for the third quarter of 1992, 1.75 percent for the fourth quarter of 1992, 1.75 percent for the first quarter of 1993, and .58 percent for April 1993. The monthly rate for April 1993 is one-third the quarterly rate of 1.75 percent.

Note that interest for each quarter of the backpay period is charged from the last day of the quarter. There is no interest charged for backpay due in the current quarter, 93/1. See Compliance Manual section 10555.7.

Note that interest is currently accruing at a weekly rate of .1346 percent. The interest amount on net backpay is thus accruing at the rate of \$12 per week.